Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES E. PAPPAS, M.D.,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ARLIN M. ADAMS
*NANCY WINKELMAN
LAUREN HIRSCH
*Counsel of Record
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 MARKET STREET, SUITE 3600
PHILADELPHIA, PA 19103
(215) 751-2000
Counsel for Petitioner

51pp

QUESTIONS PRESENTED

1. Is not the issuance of a non-precedential opinion by a Court of Appeals violative of a litigant's rights under Article III of the United States Constitution and improper as a matter of appellate process?

2. Did not the Court of Appeals err in affirming the grant of judgment as a matter of law on the basis of insufficient evidence, where the Court of Appeals also held that the District Court erred in refusing to admit certain evidence?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption.

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OPINIONS BELOW

The April 25, 2001, opinion of the Third Circuit Court of Appeals is unreported and appears in the Appendix to this petition at pages 1a to 15a. The District Court's August 10, 2000, findings of fact, conclusions of law, and final judgment appear at pages 16a to 26a of the Appendix. The Third Circuit Court of Appeals' May 29, 2001, Order denying the petition for rehearing appears at page 27a of the Appendix.

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals issued its opinion on April 25, 2001. A timely petition for rehearing was filed on May 9, 2001. The Court of Appeals entered its order denying the petition for rehearing on May 29, 2001. On August 3, 2001, this Court granted petitioner's application for extension of time in which to file a petition for a writ of *certiorari* and extended the time within which petitioner could file his petition to and including October 26, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

Internal Operating Procedures 5.3, 5 4, and 5.8 of the United States Court of Appeals for the Third Circuit provide:

> 5.3 Non-precedential Opinions. Opinions which appear to have value only to the trial court or the parties are designated by the court as unreported and are not sent by the court for publication. These may include, at the option of the majority of the panel, divided panel opinions affirming the judgment of the trial court, granting or denying a petition for review or enforcement of the order of an administrative agency, divided or unanimous opinions reversing or vacating the judgment of the trial court or remanding to the trial court, and per curiam opinions. Per curiam opinions may be utilized for affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; for dismissing an appeal; for granting or denying

a petition for review; and for granting or refusing enforcement of the order of an administrative agency. An opinion that is designated by the court as unreported shall state "unreported, not precedential" on the face of the opinion.

5.4 Memorandum Opinions. When the panel unanimously determines to affirm the judgment, order, or decision of the court under review, to dismiss an appeal, or to enforce or deny review of the order or decision of an administrative agency, and determines that a written opinion will have no precedential or institutional value, the author may choose to write a memorandum opinion briefly setting forth the reasons supporting the court's decision as an alternative to preparation of a judgment order. In that circumstance, the authoring judge will also prepare the judgment. Memorandum opinions are not used when the disposition of the court is to reverse or remand to the trial court or to grant review or deny enforcement of an order of an administrative agency or to remand to such an agency.

> 5.8 Citations. Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.

3d. Cir. I.O.P. 5.3-5.4, 5.8.

STATEMENT OF THE CASE

In 1989, Dr. Charles E. Pappas, a plastic surgeon, was involved in a motor vehicle accident that resulted in various injuries, most notably to his hands. Following the accident, Dr. Pappas experienced a gradual deterioration of his ability to practice medicine. After an unsuccessful operation in 1994 to restore function to his hands, Dr. Pappas stopped performing surgery in 1995. Dr. Pappas has since been unable to resume his practice. App. at 2a.

Dr. Pappas had purchased disability insurance policies in 1988 from UNUM Life Insurance Company of America. Those policies provided compensation for both total and partial loss of earnings due to disability. The policies also contained provisions for cost-of-living ("COLA") adjustments. App. at 3a.

In 1994, Dr. Pappas submitted claims on the policies due to his disability. Following debate between Dr. Pappas and UNUM over the amount of payments due under the

policies, including the amount of COLA benefits, and numerous requests by UNUM for additional information from Dr. Pappas, UNUM finally offered to repurchase the policies from Dr. Pappas. Dr. Pappas declined this offer. *Id.*

UNUM, on two occasions, terminated certain benefits, but after negotiations between the parties, reinstated them. UNUM ultimately reduced certain COLA benefits and declined to reinstate them. Dr. Pappas then commenced this action. In his complaint, Dr. Pappas sought a declaration of rights concerning his benefits, an award of benefits, and an award of compensation for expenses that he asserted UNUM had improperly caused him to incur. App. at 3a-4a. Dr. Pappas also sought damages for UNUM's bad faith in the handling of his claims, and alleged that UNUM was trying to force him to sell his policies back to UNUM at a fraction of their worth. App. at 4a. UNUM filed counterclaims seeking both recovery of an alleged overpayment of disability benefits and certain declarations of its rights under the policies. *Id.*

The case went to trial in the United States District Court for the Eastern District of Pennsylvania. The District Court, pursuant to a pre-trial motion, had excluded evidence under Fed. R. Evid. 408 of settlement negotiations (specifically, UNUM's offer to repurchase the policies) that Dr. Pappas intended to use for the purpose of showing UNUM's bad faith in processing his insurance claim. App.

at 5a. At the close of Dr. Pappas' case-in-chief, the Court granted UNUM's Rule 50 Motion and then, ruling that Dr. Pappas was not entitled to a jury trial as to the relief sought in UNUM's counterclaims, dismissed the jury. App. at 4a-5a. Finally, the Court ruled against Dr. Pappas on UNUM's counterclaims, holding that UNUM had overpaid past benefits (in the amount of the disputed COLA benefits) and that UNUM had no further obligation to pay COLA benefits on Dr. Pappas' disability claim. App. at 4a.

Dr. Pappas appealed to the United States Court of Appeals for the Third Circuit, that the District Court erred in: (a) not permitting him to introduce evidence of UNUM's offer to repurchase the disability policies in order to show bad faith on UNUM's part; (b) not permitting his claims to go to a jury; and (c) not permitting UNUM's counterclaims to go to a jury. App. at 5a, 8a, 15a.

The Court of Appeals held argument and then issued an "Unreported-Not Precedential" "Memorandum Opinion," in which it ultimately rejected Dr. Pappas' arguments. App. at 16a-26a. The Court ruled that the District Court erred in excluding Dr. Pappas' proffered evidence with respect to UNUM's offers to repurchase the disability policies. The Court agreed with Dr. Pappas that the admission of such evidence did not violate Rule 408 because "evidence to establish an insurer's bad faith in processing a claim is offered for a purpose other than to

establish liability on the claim itself." App. at 6a. However, the Court of Appeals went on to hold that the District Court's error was harmless, thus ultimately disposing of this issue in UNUM's favor. App. at 7a-8a.

The Court of Appeals also rejected Dr. Pappas' argument that the District Court had improperly granted UNUM's Rule 50 motion. Specifically, the Court of Appeals held that: (a) UNUM did not engage in any improper business practice in investigating the coverage disputes, nor did it act in bad faith in suspending benefits, App. at 10a-12a; (b) notwithstanding Dr. Pappas' evidence that UNUM sought to repurchase his disability policies, Dr. Pappas did not offer sufficient evidence from which a jury could find, by clear and convincing evidence, that UNUM acted in bad faith in claiming an overpayment in benefits, App. at 12a-14a; and (c) the evidence, viewed in the light most favorable to Dr. Pappas, did not supply a basis for a jury to find that Dr. Pappas clearly and convincingly demonstrated that UNUM acted in bad faith in deciding he was no longer eligible for a waiver of premium, App. at 15a.

Without discussion or analysis, the Court of Appeals further summarily rejected Dr. Pappas' other arguments – namely, that the District Court erred in dismissing the jury and trying UNUM's counterclaim as a bench trial; in declaring that the COLA benefits effective October 14, 1991, were not payable in the future; and in holding that UNUM

had overpaid Dr. Pappas COLA benefits by $110,701.55. App. at 15a. Dr. Pappas filed a timely petition for Panel Rehearing pursuant to Fed. R. App. P. 40, which the Court of Appeals denied by Order entered on May 29, 2001. App. at 27a.

REASONS FOR GRANTING THE WRIT

I. *CERTIORARI* SHOULD BE GRANTED TO PROVIDE GUIDANCE TO THE COURTS OF APPEALS AS TO THE CONSTITUTIONALITY AND PROPRIETY OF NON-PRECEDENTIAL OPINIONS.

The Court of Appeals issued its opinion in this case as an "Unreported - Not Precedential" "Memorandum Opinion." The Court did so under the authority of Third Circuit Internal Operating Procedures 5.3 and 5.4, the full text of which are set out *supra*. These internal rules permit the court to issue unreported opinions in two forms: "non-precedential opinions" and "memorandum opinions." The former involves cases in which the opinion "appears to have value only to the trial court or the parties." The second involves cases in which "the panel unanimously determines to affirm the judgment, order, or decision of the court under review." *See* 3d Cir. I.O.P. 5.3, 5.4

In the case of both forms of unreported opinions, the Third Circuit's internal rules make clear that they will not be

regarded as precedent by the court. Specifically, Internal Operating Procedure 5.8 provides:

> 5.8 Citations. Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.

3d Cir. I.O.P. 5.8.

The increasingly-common practice among the courts of appeals of issuing unreported, non-precedential opinions[1] has become the subject of much debate in the federal judiciary and among legal scholars. In *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001), Judge Smith of the United States Court of Appeals for the Fifth Circuit dissented from his colleagues' decision not to grant a rehearing on the issue, stating, "[a rehearing] would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to

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[1] *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 72 (2001)("For more than a quarter century, the United States Courts of Appeals have maintained two bodies of law. One is published, widely disseminated, and fully precedential. The other, now encompassing nearly 80% of all dispositions on the merits, is unpublished, erratically distributed, and rarely precedential.")(relying on statistics gathered from the Administrative Office of the United States Courts).

the fair administration of justice in this circuit." *Williams*, 256 F.3d at 260. Judge Smith went on to explain: "the practice of refusing to recognize unpublished opinions as precedent raises important prudential questions...[t]he law is supposed to inform the choices of potential litigants. How can this circuit's decisions do so, if they carry no predictive effect?" *Id.* at 263. *See also Melancon v. United States*, 972 F.2d 566, 570 n.2 (5th Cir. 1992)(Parker, D.J. concurring specially); *Pruitt v. Levi Strauss and Co.*, 932 F.2d 458, 467 n.2 (5th Cir. 1991)(Johnson, J., dissenting in part).[2]

Indeed, the issue is of such importance that at least three members of the appellate judiciary have felt compelled to publish academic articles on the subject. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, Cal. Lawyer, June 2000, at 43; Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

Not only is the escalating practice of issuing non-precedential opinions of concern to the bench and to legal scholars, it also is a matter of fundamental importance to

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[2] The controversy has been no less profound among scholarly publications: *See* Merritt & Brudney, *supra*, at 72 ("[The] debate has become especially compelling...it raises profound questions about the place of these opinions in our jurisprudence."); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 Green Bag 2d 17, 18 (2000)("[the debates] prompt questions about the fundamental nature of judging.").

litigants such as petitioner. Such litigants have been denied the certainty of knowing that their cases have been given the requisite amount of consideration in the courts of appeals, which are, for all intents and purposes, courts of last resort for most litigants. While the practice of issuing unreported, non-precedential opinions may be convenient to the courts, it serves no purpose - in fact, it disserves the bar. It places litigants like Dr. Pappas in the untenable position of not knowing whether the Court of Appeals in fact gave his case the time and effort it required, and whether the Court truly considered the validity of the District Court's opinion. If, in fact, the courts of appeals are effectively the courts of last resort, then they cannot abdicate their responsibility in the name of caseload control and convenience. To do so vastly diminishes public confidence in the judicial system.

Moreover, the Court of Appeals' failure to publish its opinion is particularly egregious here, where the Court actually made new law on one critical point: whether an insurer's offer to repurchase insurance policies is admissible as evidence of the insurer's bad faith, notwithstanding Federal Rule of Evidence 408. App. at 5a-7a. Under such circumstances in particular, the Court's opinion should have been reported and should have been accorded precedential status.

In fact, Judge Smith in *Williams* recognized this very phenomenon: "[t]here are opinions that, though

unpublished, do establish a new rule of law or apply existing law to distinct facts. ... Empirical evidence suggests that [unpublished cases which establish new law] are more common than one might think." *Williams*, 256 F.3d at 262. Indeed, "As an empirical matter, plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court, demonstrating that it is difficult to make prospective decisions about which legal issues are 'easy' in the abstract." *Williams*, 256 F.3d at 262 n.3 (quoting Boggs & Brooks, *supra*, at 20-21).

The debate regarding non-precedential opinions recently came to a head when a panel of the Eighth Circuit Court of Appeals held that Article III of the United States Constitution requires that all of the holdings of federal courts of appeals constitute binding precedent. *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000)(discussing U.S. CONST. art. III, § 1, cl.1).[3] The

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[3] *Anastasoff* was vacated as moot when the parties settled their claims out of court before the *en banc* hearing could be held. However, *Anastasoff* has since been cited as "persuasive authority," *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863, at *2 (9th Cir. Sept. 24, 2001). Moreover, as noted above, the issue of the constitutionality and propriety of non-precedential opinions is of great concern in the legal community. In the four months after the panel issued its opinion in *Anastasoff*, a Shephards search reveals that the case was cited in ten different United States District Court decisions. It continues to be cited even in its persuasive state by all levels of courts, and in twenty-four separate articles in law reviews and periodicals.

Ninth Circuit Court of Appeals flatly disagreed, holding that, "[u]nlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority." *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863, at *60 (9th Cir. Sept. 24, 2001). Given the stakes for both the bar and the judiciary, this Court should grant this petition in order to give critical guidance to the courts of appeals as to whether the now-common practice of issuing unreported, non-precedential opinions is constitutional and proper.

A. The Courts of Appeals' Varying Approaches.

Recently, there has been a proliferation of appellate opinions that carry such designations as "unpublished" or "unreported," and "non-precedential." The sheer number of cases disposed of with the above designations has rapidly outpaced the number of cases that are published and which are intended to have traditional precedential effect. *See* note 1, *supra*. This phenomenon has frustrated litigants' efforts to ascertain any particular circuit's law as it relates to a wide variety of factual scenarios. Equally frustrating has been the diversity of thought among the circuits as to how to treat such opinions within the context of the body of law they do choose to treat as binding.

First, in some circuits, it is impossible even to find unreported opinions, whereas other circuits release their unreported opinions to on-line research sources such as LEXIS or Westlaw. Second, the circuits treat their unreported opinions in terms of the precedential weight given to them, if any, in a wide variety of ways. The Fifth Circuit considers its pre-1996 unpublished opinions as binding authority, and its post-1996 opinions as persuasive authority. 5th Cir. R. 47.5.3-4. The Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits permit litigants to cite and discuss unreported opinions, yet such opinions remain no more than persuasive authority. *See* 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A; 10th Cir. R. 36.3; 11th Cir. R. 36-2.

The First, Second, Seventh, Ninth, District of Columbia, and the Federal Circuits not only do not accord even persuasive weight to their unpublished opinions, but discourage (and for most circuits, prohibit) any mention of the same. *See* 1st Cir. R. 36(b)(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3; D.C. Cir. R. 28(c); Fed Cir. R. 47.6. The Third Circuit does not address litigants' rights with respect to citation of unreported opinions, but does state that the court "by tradition" will not cite its own unpublished opinions. 3d Cir. I.O.P. 5.8. And, as noted above, all these circuits vary as to the availability of these opinions on research portals.

B. The Eighth Circuit Panel's Opinion in *Anastasoff v. United States.*

Faced with this morass and with the increasing frequency by the courts of appeals in the use of non-precedential opinions, in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000), a panel of the United States Court of Appeals for the Eighth Circuit held that issuing non-precedential opinions "is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" *Id.* at 899. The panel in *Anastasoff* based its conclusion on an examination of the historical basis of the rule of law, stating that it occupies an essential element in American jurisprudence—similarly-situated parties should be held to the same standard of law. *Id.* at 900 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991)).

The crux of the issue for the panel in *Anastasoff* was a legitimate fear of creating an alternative body of law. Such a body of law may or may not have any reflection on the state of the law as it stands, and would exist to reduce the workload of some appellate judges. The panel did not believe such a reason adequate to justify not treating all cases with the requisite due care. *Anastasoff*, 223 F.3d at 904. "We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as precedent. If this is true, the judicial system is

indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only." *Id.* Expressed even more forcefully, "a more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles." *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (1833)). According to *Anastasoff*, "lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents...If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed." *Anastasoff*, 233 F.3d at 904.

The Court of Appeals for the Ninth Circuit has taken the directly contrary view.

C. The Ninth Circuit's Opinion in *Hart v. Massanari.*

The United States Court of Appeals for the Ninth Circuit expressly rejected *Anastasoff's* holding in *Hart v. Massanari*, 2001 U.S. App. LEXIS 20863 (9th Cir. Sept. 24, 2001). As the Court stated, "[*Anastasoff*] may seduce members of our bar into [citing not precedential opinions in violation of Ninth Circuit rules] under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest." *Id.* at *2-3.

Disagreeing that the concept of binding precedent is a core value of the Constitution, the Ninth Circuit expressed that strict adherence to such a concept would unduly "freeze certain aspects of the law into place, even as other aspects change significantly." *Id.* at *12. Indeed, the Ninth Circuit took issue with the idea that written law can adequately capture precedent and rules of law in a precise enough way to justify treating all cases as precedent. "[B]inding precedent means something different altogether when a court speaks with seven or nine voices than with a single voice. Nine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court." *Id.* at *11.

Central to the Ninth Circuit's holding were its assertions that a system of precedent fails to account for changes in custom, and that ignoring the rulings set in some cases is tantamount to ignoring precedent as a whole. As the Court explained, "[t]he common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance." *Id.* at *24.

* * *

With the issuance of a non-precedential opinion, the Court of Appeals has failed petitioner by effectively telling him, "[w]e may have decided this question the opposite

way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." *Anastasoff*, 233 F.3d at 904.[4] When the courts of appeals issue unreported opinions with non-precedential status, the result can only be diminished confidence by litigants such as Dr. Pappas that they have, indeed, had their day in court. *Certiorari* should be granted in order to provide guidance to the courts of appeals on this important issue.

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[4] The issue is particularly apt in this case, where the Court of Appeals disregarded clear binding precedent in the context of a non-precedential opinion. The Pennsylvania Supreme Court has clearly stated that no cause of action can exist for unjust enrichment when the claim is predicated on a contract. *See Schott v. Westinghouse Electric Corp.*, 259 A.2d 443, 448 (Pa. 1969). The United States Court of Appeals for the Third Circuit applied *Schott*'s explanation of Pennsylvania law in *Benefit Trust Life Ins. Co. v. Union Nat. Bank*, 776 F.2d 1174, 1177 (3d Cir. 1985). UNUM's counterclaim was based entirely on a theory of unjust enrichment arising out of a contract. Thus, the Court of Appeals essentially disregarded its very own precedent in affirming the judgment for UNUM on its counterclaim. To do so, the Court could not have issued a binding opinion, as such an opinion would have been an implicit overruling of *Benefit*, something only the *en banc* Court could do. *See* 3d Cir. I.O.P. 9.1.

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW ON THE BASIS OF INSUFFICIENT EVIDENCE, WHILE AT THE SAME TIME HOLDING THAT THE DISTRICT COURT HAD ERRED IN REFUSING TO ADMIT EVIDENCE.

The true underlying cause of UNUM's behavior remains a factual one. A jury was the proper body to decide the relative weight to give the various pieces of evidence presented, as well as the erroneously-excluded evidence. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theaters Inc., v. Westover*, 359 U.S. 500, 501 (1959)(quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). "The right to a jury trial is a constitutional one," but "no similar requirement protects trials by the court." *Beacon*, 359 U.S. at 510.

It is the jury alone that should have been entrusted with the decision as to whether or not UNUM's behavior was sufficient to give rise to a bad faith insurance claim. When the District Court granted UNUM's motion for judgment as a matter of law, it improperly denied petitioner's right to have his claims heard by a jury.

But, to make matters worse, not only did the Court of Appeals affirm the grant of UNUM's Rule 50 motion - it did so after having held that the District Court had erroneously excluded a critical piece of evidence with respect to Dr. Pappas' bad faith claim (the fact that UNUM had sought to repurchase the policies). The Court of Appeals' conclusion that, on the one hand, the District Court properly granted judgment as a matter of law for UNUM, and, on the other, that the District Court's exclusion of key evidence was harmless error, defies logic.

As the Court of Appeals held, the District Court erred in refusing to admit evidence of UNUM's bad faith in administering petitioner's disability claim. App. at 7a. The purpose of Dr. Pappas' proffer of this evidence was to show bad faith - not to establish liability on the claim itself. While Federal Rule of Evidence 408 generally excludes evidence of conduct during settlement negotiations to prove a party's liability, the Court of Appeals properly deemed that using such evidence to establish bad faith fell outside the Rule 408 prohibition. App. at 5a-7a.

However, the Court of Appeals then went on to hold that the error was merely harmless. App. at 7a-8a. But failing to admit the evidence that UNUM had sought to repurchase the policies not only prohibited Dr. Pappas from establishing his claim for bad faith, but also it improperly provided the basis for the District Court to direct a verdict

against Dr. Pappas. For the Court of Appeals then to state that the failure to admit the evidence was harmless error since the directed verdict was proper, *see* App. at 13a-14a, is circular indeed.

It is impossible to determine whether or not the directed verdict was harmless error without the admission of the disputed evidence. As such, Dr. Pappas' substantial rights were seriously affected when he was denied his opportunity to present his argument to a jury. *Certiorari* should be granted in order to determine the scope of petitioner's right to a jury trial as well as to examine the limits of the harmless error doctrine.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

ARLIN M. ADAMS
*NANCY WINKELMAN
LAUREN HIRSCH
*Counsel of Record
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 MARKET STREET, SUITE 3600
PHILADELPHIA, PA 19103
(215) 751-2000
Counsel for Petitioner

Dated: October 26, 2001.

Filed: April 25, 2001

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2484

CHARLES E. PAPPAS, M.D.,

Appellant

v.

UNUM LIFE INSURANCE COMPANY
OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-07162)
District Judge: Honorable Herbert J. Hutton

Argued April 3, 2001

BEFORE: ROTH, STAPLETON, and GREENBERG,
Circuit Judges

(Filed: April 25, 2001)

John J. Seehousen (argued)
P.O. Box 795
Langhorne, PA 19047-0795

Attorney for Appellant

E. Thomas Henefer (argued)
Stevens & Lee
111 North Street
P.O. Box 679
Reading, PA 19603

Attorneys for Appellee

MEMORANDUM OPINION OF THE COURT

GREENBERG, *Circuit Judge*

This matter comes on before this court on appellant Charles E. Pappas' appeal in this action arising from claims he made on two disability insurance policies issued by appellee UNUM Life Insurance Company of America. Inasmuch as we are writing only for the parties' benefit rather than for publication, we merely summarize the background of the case.

Pappas' claims arose out of injuries he sustained in a 1989 automobile accident which led to a progressive impairment of his ability to use his hands, obviously a crucial matter to him as he is a plastic surgeon. Unfortunately, surgical intervention was apparently unsuccessful and he alleges that as a result of his condition in June 1995 he stopped performing operations. He has not resumed the practice of plastic surgery.

Pappas has had a long history of dealings with UNUM with respect to disability insurance dating back to 1980 when he purchased income protection disability coverage from that company. The current dispute, however, involves policies UNUM issued in 1988 with provisions for compensation on account of total and partial loss of income. As highly significant in this litigation, the policies, as amended, provided for cost-of-living ("COLA") adjustments which are subject to certain limitations.

In August 1994, Pappas made claims on the policies on account of his disability. During the next several years, in the course of which UNUM made substantial payments on the policies, Pappas and UNUM had numerous disputes as to what was due on them. This is hardly surprising as the policies are complex and the benefits they provide depend on the insured's physical condition and income. As a result of the disputes, which at times seem to have been acrimonious, UNUM from time to time sought additional information from Pappas and carefully examined his claims. Moreover, in an action leading to a central dispute in this litigation, UNUM unsuccessfully attempted to repurchase Pappas' policies, an undertaking which, if accepted by Pappas, would have substituted a lump-sum payment for the periodic payments due under the policies.

Ultimately, when the parties were unable to resolve their differences, Pappas commenced this litigation by filing a writ of

summons in the Court of Common Pleas, Philadelphia County, Pennsylvania. UNUM removed the case to the district court where it remained after the court denied Pappas' motion to remand.

In his complaint, Pappas alleged that UNUM had acted in bad faith in processing his claim for disability benefits and thus violated 42 Pa. Cons. Stat. Ann. § 8371. Pappas sought damages for this alleged violation. He also sought compensation for the expenses he incurred in complying with UNUM's investigation of his disability claim, as well as a declaration of his rights regarding the method to be used in calculating his benefits and an award of additional benefits if UNUM was allowed to disavow an alleged agreement between the parties as to the inception date of Pappas' disability.

UNUM filed an answer to the complaint as well as a counterclaim seeking recovery of disability benefits which it asserted it overpaid. After Pappas replied, UNUM amended its counterclaim to include an allegation that Pappas was not entitled to certain COLA benefits as they were precluded under exclusionary riders issued effective October 14, 1991. Thus, UNUM sought restitution and a declaration that it was not obligated to pay certain COLA benefits.

During the trial of the case, UNUM made a successful motion seeking judgment as a matter of law under Fed. R. Civ. P. 50 on Pappas' claims. After granting the motion, the court

dismissed the jury as it ruled that Pappas was not entitled to a jury trial on UNUM's counterclaim. Following a bench trial, the court ruled under Fed. R. Civ. P. 52(a) and 58 that UNUM had overpaid COLA benefits in the amount of $110,701.55. Additionally, the court entered a declaratory judgment that, effective October 14, 1991, COLA benefits were not payable. Pappas then filed a timely notice of appeal.

Pappas' first argument is that the district court erred in excluding evidence of UNUM's offers to repurchase the disability policies as, in his view, the court erroneously excluded evidence of the offers on the basis that the offers were settlement negotiations. Pappas contends that this ruling was incorrect because he sought to introduce UNUM's offers as evidence of its bad faith.

Fed. R. Evid. 408 generally excludes evidence of conduct during settlement negotiations to prove a party's liabilities for the disputed claim. Such evidence may be admitted, however, "when [it] is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.* We are satisfied that evidence to establish an insurer's bad faith in processing a claim is offered for a purpose other than to establish liability on the claim itself. Thus, inasmuch as the district court dealt with Pappas' claim that UNUM acted in bad faith in investigating his claims on the

disability policies, evidence of UNUM's offers to repurchase them to demonstrate that point should not have been excluded under Rule 408 because, rather then being offered to prove liability for the payments, it was "offered for another purpose." *See Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000) (holding evidence of insurer's conduct during settlement conference was not inadmissible because it was "offered for another purpose," namely to show bad faith); *Council for the Nat'l Register of Health Serv. Providers in Psychology v. American Home Assurance Co.*, 632 F. Supp. 144, 146 n.1 (D.D.C. 1985) (same); *Olin Corp. v. Insurance Co. of N. Am.*, 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (nothing in dicta that Rule 408 may not exclude evidence that shows bad faith failure of insurance carrier to settle).

We reach this conclusion notwithstanding cases UNUM cites that hold to the contrary. *See Light v. Allstate Ins. Co.*, 48 F. Supp. 2d 615, 617 (S.D.W.V. 1988); *Tiscornia v. The Travelers Corp.*, No. 1:95 CV 862, 1996 U.S. Dist. LEXIS 17691, at *30 (W.D. Mich. Oct. 28, 1996).[1] In rejecting the holdings in those cases, we have not lost sight of the policy of Rule 408 to promote and encourage settlement negotiations. *See Affiliated Mfrs., Inc. v.*

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[1] UNUM cites to two other cases in support of its argument that this evidence was properly excluded, *Johnson v. Occidental Fire & Cas. Co.*, 954 F.2d 1581, 1585 (11th Cir. 1992), and *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999). We do not discuss these cases, however, as neither has more than a tangential relationship to the issue at hand.

Aluminum Co. of Am., 56 F.3d 521, 526 (3d Cir. 1995). Nevertheless, that policy is not controlling in all cases involving offers of settlement as the rule allows introduction of evidence of settlement negotiations for purposes other than to demonstrate liability for the underlying claim. *See* Fed. R. Evid. 408. Further, under Pennsylvania law, an insurer's conduct with regard to settlement may constitute evidence of bad faith. *See Clark v. Interstate Nat'l Corp.*, 486 F. Supp. 145, 146 (E.D. Pa.) (holding insurer's failure to accept settlement proposal was evidence of bad faith), *aff'd*, 636 F.2d 1207 (3d Cir. 1980) (table); *see also O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 907 (Pa. Super. Ct. 1999) (finding insurer's conduct during pendency of litigation may be considered evidence of bad faith). Accordingly, we reiterate that evidence of UNUM's attempts to repurchase Pappas' disability policies was not inadmissible under Rule 408 because it was offered for a purpose other than to demonstrate UNUM's liability on its policies, *i.e.*, to prove its bad faith. Thus, the district court erred in excluding the evidence.[2]

Our conclusion that the district court erred in excluding Pappas' evidence, however, does not necessarily lead us to reverse the district court's judgment because "[a]n erroneous decision to admit or exclude evidence does not constitute

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[2] Even if we viewed the issue on an abuse of discretion basis, our result would be the same. *See In re Consolidation Coal Co.*, 123 F.3d 126, 131 (3d Cir. 1997).

reversible error unless 'a substantial right of the party is affected.'" *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995) (quoting *Linkstrom v. Golden T. Farms*, 883 F.2d 269, 269 (3d Cir. 1989) and citing Fed. R. Evid. 103(a)). A nonconstitutional error in a civil suit may be deemed harmless "if it is highly probable that the error did not affect the outcome of the case." *Id.* We will discuss the harmless error issue as a portion of our opinion addressing the district court's decision to grant UNUM judgment as a matter of law on Pappas' bad faith claim.

Pappas' second argument is that the district court improperly granted UNUM's Rule 50 motion for judgment as a matter of law. A Rule 50 motion should be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). The court must deny a Rule 50 motion "if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Bielevicz v. Dubinon*, 915 F.2d 845, 849 (3d Cir. 1990). We exercise plenary review on this issue. *See Lightning Lube*, 4 F.3d at 1166.

Pennsylvania law provides a cause of action for insureds against their insurers for bad faith. *See* 42 Pa. Cons. Stat. Ann. § 8371. Specifically, the statute states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

Id. Bad faith by an insurer has been defined as:

> [A]ny frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (*i.e.*, good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994); *see Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d Cir. 1994). Section 8371 provides a cause of action independent from success upon the merits or trial of an

underlying claim. *See Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307-08 (3d Cir. 1995). To prevail on a bad faith claim, the plaintiff must show that the insurer did not have a reasonable basis for denying benefits under the policy and that it knew or recklessly disregarded the lack of a reasonable basis for denying the claim. *See Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 233 (3d Cir. 1997). The plaintiff has the burden to prove both of these elements by clear and convincing evidence. *See Polselli*, 23 F.3d at 750.

It appears to us that Pappas has claimed that UNUM acted in bad faith in three ways: first, by suspending his benefits for several months during 1996, ostensibly on account of his refusal to cooperate with what he claims was an unreasonable investigation of his claim; second, by claiming an overpayment in benefits, allegedly to create leverage to induce Pappas to sell his policies back to UNUM and consequently reducing those payments; and third, by terminating his Waiver of Premium benefit applicable when UNUM knew he was disabled. The district court held, however, that it was "plainly apparent" that Pappas had not proven bad faith by clear and convincing evidence.

Pappas contends first that UNUM acted in bad faith by suspending its payment of disability benefits for approximately four months in 1996. He asserts that UNUM unreasonably requested irrelevant, duplicative and onerous amounts of

information, and then wrongfully denied him benefits when he refused to comply. The district court found, however, "that there was a reasonable dispute concerning plaintiff's past and present earnings which necessitated defendant's continued investigation." Specifically, the parties disagreed on how much of Pappas' income was attributable to his pre- and post-disability activities. Further, Pappas and UNUM disagreed as to the allocation of business expenses between Pappas and his business associate. These calculations were significant because, under the terms of the policies, they affected Pappas' eligibility for benefits, as well as their amount. Although Pappas argues that he had provided UNUM with all of the relevant information it possibly could need both to determine his eligibility for benefits and the amount of the payments due, UNUM was entitled to investigate further. Indeed. the disability policy expressly states:

> We must be given the information which we need to determine if a benefit is payable and how much that benefit should be. We may require relevant portions of income tax returns for the Insured or his business, income statements, vouchers for overhead expenses, and other statements or reports of receipts and payments. We may also require evidence that the Insured was liable for an overhead expense before disability began.

Appellee's App. at 296.

Therefore, it cannot be said that UNUM engaged in any improper business practices in investigating legitimate disputes and discrepancies that had a direct affect on UNUM's obligation under the disability policies. Similarly, in light of the fact that, notwithstanding the disputes surrounding its obligations, UNUM had been paying disability benefits, it cannot be said that UNUM acted in bad faith by finally suspending those benefits when Pappas stopped complying with its requests for information. *See Hofkin v. Provident Life & Acc. Ins. Co.*, 81 F.3d 365, 375 (3d Cir. 1996) (finding insured failed to prove bad faith claim where insurer refused to pay benefits to party that was "less than diligent" in providing information that was necessary to evaluate his insurance claims); *Zakeosian v. Provident Life & Accident Ins. Co.*, Civ. A. No. 97-7883, 1999 U.S. Dist. LEXIS 6292, at *5-6 (E.D. Pa. Apr. 26, 1999) (rejecting insured's bad faith claim where insurer withheld benefit payments until insured provided necessary claims information); *Federated Life Ins. Co. v. Walker*, Civ. A. No. 96-3387, 1997 U.S. Dist. LEXIS 566, at *40-41 (E.D. Pa. Jan. 17, 1997) (holding insurer's suspension of payments on five separate occasions because insured failed to provide necessary proof of loss information was not bad faith). The district court, therefore, did not err in finding this aspect of Pappas' bad faith claim unmeritorious.

Pappas also argues that UNUM acted in bad faith by claiming an overpayment in benefits, allegedly to create

leverage to induce Pappas to sell his policies back to UNUM, and consequently reducing those payments. As discussed previously, however, there was a legitimate dispute as to the amount of benefits owed under the policies. UNUM recalculated Pappas' benefit payments several times, using the various and differing financial information provided to it, each time resulting in a different amount owed, but every time resulting in the conclusion that Pappas' initial benefit payments were too high. Considering this history in light of UNUM's inability to obtain certain information from Pappas, he did not proffer enough evidence from which a jury could find, by clear and convincing evidence, that UNUM acted in bad faith.

We reach our conclusion notwithstanding Pappas' evidence that from January 1996 to March 1997, UNUM sought to repurchase his disability policies. While, as discussed above, settlement attempts by an insurer may be evidence of bad faith, Pappas' allegations, even when combined with all the other evidence in the case, would not allow a jury to conclude that he demonstrated bad faith by clear and convincing evidence. UNUM had a legitimate dispute with Pappas over the amounts due under his policies, one to which he contributed by his reluctance to comply with UNUM's investigation. Accordingly, it is not reasonable to infer that it acted in bad faith in attempting to settle the dispute. With nothing else to support his claim, and even taking into account UNUM's attempt to repurchase its policies, Pappas' evidence would not permit a

jury to conclude that Pappas clearly and convincingly established that UNUM acted in bad faith.

Finally, Pappas claims that UNUM acted in bad faith by terminating his Waiver of Premium benefit. Specifically, Pappas' policy provides:

> Waiver of Premium: After the disability has lasted for ninety days while this policy is in effect, we will waive the premium as long as the insured is unable to return to work full time in his regular occupation as a result of the injury or sickness which causes the disability. We will refund premiums already paid for that period on a pro-rated basis.

Appellee's App. at 294. Therefore, in order to qualify for a waiver of premium, the insured must not be able to work approximately the same number of hours in his regular profession as he did prior to the injury. *See id.* at 292. Here there was a dispute between Pappas and UNUM regarding exactly how much he was working following his claim for disability benefits. Although Pappas claimed that he was totally disabled, his office's billing records undermined this contention. Accordingly, the evidence, even considered in a light most favorable to Pappas, cannot be regarded as supplying a basis for a jury to conclude that he clearly and convincingly demonstrated that UNUM acted in bad faith in deciding he was no longer eligible for the waiver of premium. The district court did not err, therefore, in granting UNUM's motion for judgment as a matter of law.

Pappas' final three points on the appeal are that the district court erred in dismissing the jury and trying UNUM's counterclaim as a bench trial, in entering a declaration that the COLA benefits effective October 14, 1991, were not payable in the future, and in finding an overpayment of COLA benefits of $110,701.55. We carefully have examined these contentions and conclude that they are not meritorious. Accordingly, we reject these claims without discussion.

The order entered on August 11, 2000, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

BY THE COURT:

/s/Morton I. Greenberg
Circuit Judge

DATED: April 25, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES E. PAPPAS,	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	NO. 97-7162

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL JUDGMENT

HUTTON, J. August 10, 2000

Plaintiff, on or about October 23, 1997, filed a state court complaint against Defendant UNUM Life Insurance Company ("UNUM" or "Defendant") which, *inter alia*, alleged UNUM acted in bad faith in determining his claim for disability benefits. On or about, November 21, 1997, Defendant removed the above captioned action to the United States District Court for the Eastern District of Pennsylvania. Thereafter, Defendant asserted counterclaims for a Declaratory Judgment, unjust enrichment, and overpayment of benefits. A trial on the merits commenced on July 18, 2000. On July 24, 2000, the Court granted Defendant's Rule 50 Motion, finding, as a matter of law in favor of Defendant on Plaintiff's claims.

On July 25, 2000, the Court, in a bench trial, heard Defendant's equitable counterclaims for a Declaratory Judgment

and Unjust Enrichment. Defendant abandoned its claim for overpayment of benefits. Pursuant to Federal Rule of Civil Procedure 52(a), of benefits. Pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Plaintiff purchased two individual disability income policies from UNUM.

2. The benefits payable under Plaintiff's policies were testified to at trial by Constance M. Cardamone, manager of the Portland Certified Public Accountant Team for UNUM. (*See* 7/25/00 Trans. at 6-34).

3. Disability benefits under policy LAD044461 are divided into two Coverage Groups, one providing for a maximum benefit of $4,339 per month, and the other providing for a maximum benefit of $3,100 per month. (*See* 7/25/00 Trans. at 9-11).

4. Disability benefits under policy LAD049933 insured a single coverage group with a maximum benefit of $6,199 per month. (*See* 7/25/00 Trans. at 12-13).

5. Initially, Plaintiff's policy LAD044461 contained a Cost of Living Adjustment ("COLA") rider which was

applicable only to Coverage Group Two. (*See* 7/25/00 Trans. at 11).

6. Plaintiff was not entitled to purchase COLA increases under Policy Rider CLC86 as he did not satisfy the requirements of such entitlement; specifically that the Maximum Disability Benefit had not been adjusted pursuant to the rider while the insured was under a previous disability. (*See* 7/25/00 Trans. at 14-15).

7. On or about May 31, 1991, Plaintiff completed and submitted an Application for Change with respect to policies LAD044461 and LAD049933, requesting COLA benefits on the portions of the policies which were not subject to such benefit. (*See* 7/25/00 Trans. at 12).

8. Said Application for Change is by its terms preliminary with respect to its coverage as the language of the Agreement states that "the company will rely on the information provided in this application and any subsequent medical exams or tests and other questionnaires to determine whether to provide the requested coverage."

9. Plaintiff in the Application for Change represented that he had carpal tunnel syndrome but had a "good recovery."

10. As a result of Plaintiff's disclosure of his medical history and Defendant's investigation, the COLA benefits for

which Plaintiff applied under the Application for Change were subject to an Exclusion Rider which states that "no benefit of any kind or amount is payable to anyone for any loss, impairment or disability due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . . ."

11. Plaintiff signed the Exclusion Rider on or about November 5, 1991, with an effective date of October 14, 1991, containing the language "once this Exclusion Rider is signed, it binds all persons claiming any interest under the policy."

12. On or about August 15, 1994, Plaintiff filed an individual Disability Claim Form for benefits under his policies for a disabling condition due to "pain [in] shoulders and hands; numbness and weakness [in] hands []; from MVA."

13. On or about August 30, 1994, Plaintiff's physician, Ronald J. Horvath, M.D., completed an Attending Physician Statement which states that Plaintiff's primary diagnosis is "cervical disk syndrome, traumatic bilateral carpal tunnel [syndrome]."

14. Plaintiff confirmed this diagnosis when he testified as a Medical Doctor and Surgeon. Such testimony reads as follows:

> Q: Doctor, do you have an opinion based on a reasonable degree of medical certainty as to whether the problems that you are experiencing,

> the numbness in your fingers and in your hand are related to the cervical radiculopathy, the carpal tunnel or some other source? . . .
>
> A: I believe that the answer is yes. The *dominant* reason is due to radiculopathy and the inception of carpal tunnel syndrome following the accident. There are other reasons . . . . And it is the opinion of those who have seen me since professionally that there may have been a problem or a reaction to the surgery. Maybe something happened surgically that caused the problem.

(*See* 7/25/00 Trans. at 39-40 (emphasis added).

15. By the terms of the Exclusion Rider injuries "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . ." are explicitly excluded from the benefits provided under the COLA riders effective October 14, 1991.

16. As a result of the complexity in determining the amount of Plaintiff's underlying disability claim, Rebekah Groves, an employee of UNUM, testified that although COLA benefits had been paid since 1994, it was not until August 1998 that UNUM discovered that it may be incorrectly paying COLA benefits and that such error was the result of an oversight due to "a lot of back and forth, back and forth with the financial unit in adjusting the benefits and changing the date of loss that it was just something that kind of got lost in the shuffle." (*See* 7/19/00 Trans. at 152-53). Given the complexity of Plaintiff's

claim, as evidenced by the entire testimony of both Plaintiff and Defendant throughout the trial, the Court finds Rebekah Groves' explanation credible.

17. Through the testimony of Constance M. Cardamone, Defendant demonstrated that through January 1, 2000, UNUM had paid a total of $88,361.23 under the COLA riders which were subject to the Exclusion Rider. (*See* 7/25/00 Trans. at 23-29).

18. UNUM is currently paying $2,792,54 per month under the excluded COLA riders, thereby bringing the current total of COLA payments to $110,701.55. (*See* 7/25/00 Trans. at 29).

19. Plaintiff's disability policies do not contain a provision for recovering incorrectly paid COLA benefits.

II. CONCLUSIONS OF LAW

1. The right to a jury trial in federal court, regardless of whether the claim arises under state law, presents a question of federal law. *See City of Philadelphia Litigation v. City of Philadelphia*, 158 F.3d 723, 726 (3d Cir. 1998).

2. As a general rule, the right to a jury trial is protected by the Seventh Amendment, when the claim is a legal one, but not if it is equitable. *See Hatco Corporation v. W.R. Grace & Co.*, 59 F.3d 400, 411 (3d Cir. 1995).

3. The Court has discretion to afford declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994). In exercising such discretion the Court should consider the following factors: (1) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies. *See Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1124 (3d Cir. 1989).

4. Unjust enrichment under Pennsylvania Law is a claim sounding in equity. *See Meehan v. Cheltenham Twp.*, 410 Pa. 446 (Pa. 1963). The essential elements of a counterclaim of unjust enrichment are benefits conferred upon plaintiff, appreciation of such benefits by plaintiff, and the acceptance and retention of such benefits under circumstances that would make it inequitable for plaintiff to retain the benefit without payment for value. *See Metropolitan Life Insurance Co. v. Brown*, No. CIV.A.97-2002, 1998 WL 1084680, at *4 (W.D. Pa. Dec. 1, 1998); *see also Burgettstown-Smith Twp. Joint Sewage Authority v. Lengeloth Townsite Co.*, 403 Pa. Super. 84, 88 (Pa. Super. Ct. 1991).

5. Defendant has no adequate remedy at law to recover incorrectly paid COLA benefits, thus it asserts equitable counterclaims for Declaratory Judgment and Unjust Enrichment.

6. Under Pennsylvania law, an insurer may recover payments to the insured under a mistake of fact or as a result of fraud or misrepresentation. *See Van Riper v. The Equitable Life Assur. Soc.*, 561 F. Supp. 26, 33 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1397 (3d Cir. 1983) ; *see also Foster v. Federal Reserve Bank of Philadelphia*, 113 F.2d 326, 327-28 (3d Cir. 1940).

7. An agreement may not be avoided, regardless of consideration, if it contains language (in any form) that the signer intends to be legally bound. *See* 33 P.S. § 6 (1997).

8. The COLA Exclusion Rider was issued pursuant to the unambiguous terms of Plaintiff's Application of Change as said application explicitly contemplates UNUM's investigation of Plaintiff's medical history prior to the issuance of modified coverage. Nevertheless, the Exclusion Rider is enforceable independently as it expresses an intent by the signer to be legally bound as evidenced by the language "once this Exclusion Rider is signed, it binds all persons claiming any interest under the policy." *See* 33 P.S. § 6 (1997).

9. The terms of the Exclusion Rider are unambiguous in that it excludes payment of COLA benefits that are "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . . ."

10. By a preponderance of the evidence Defendant has shown that Plaintiff's COLA benefits, effective October 14, 1991, are subject to exclusion as Plaintiff's injuries are at a minimum "contributed to by" radiculopathy and/or carpal tunnel syndrome. Specifically the Court finds Plaintiff's Application for Disability Benefits, Plaintiff's Attending Physician Statement, and Plaintiff's July 25, 2000, testimony concerning the nature of his disability persuasive on this issue. (*See* 7/25/00 Trans. at 39-40).

11. Defendant has demonstrated that the disputed COLA benefits were paid to Plaintiff upon a mistake of fact due to an administrative and/or clerical oversight.

12. Plaintiff has received COLA benefits which were subject to the Exclusion Rider in the amount of $110,701.55.

13. As Plaintiff was aware that the Exclusion Rider applied to Injuries "due to, contributed to by, or resulting from carpal tunnel syndrome; radiculopathy or injury, disease or disorder of the cervical spinal region . . ." the Court finds that it would be inequitable for Plaintiff to retain benefits to which he was not entitled.

14. Upon considering the appropriate factors with respect to the issuance of a Declaratory Judgment, the Court finds that such considerations weigh in favor of issuance. Such action will alleviate the need for further litigation over Plaintiff's future entitlement to COLA benefits, serves no

hardship upon the Plaintiff, furthers the convenience of the parties, clarifies Defendant's requirements under an otherwise uncertain obligation, and is an appropriate remedy as Defendant has no adequate remedy at law.

This Court's Final Judgment follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES E. PAPPAS,	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	NO. 97-7162

FINAL JUDGMENT

AND NOW, this 10th day of August, 2000, pursuant to Federal Rules of Civil Procedure 52(a) and 58, IT IS HEREBY ORDERED that judgment in the amount of $110,701.55 is entered in favor of Defendant and against Plaintiff Charles E. Pappas.

IT IS HEREBY FURTHER ORDERED that pursuant to 28 U.S.C. § 2201, the Court Orders that Defendant UNUM Life Insurance Company has no further obligation to provide Plaintiff, Charles E. Pappas, COLA benefits on his ongoing disability claim with respect to COLA benefits with an effective date of October 14, 1991.

BY THE COURT:

/s/ Herbert J. Hutton, J.
HERBERT J. HUTTON, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2484

CHARLES E. PAPPAS, M.D.

Appellant

v.

UNUM LIFE INSURANCE COMPANY
OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-07162)

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL

BEFORE: ROTH, STAPLETON, and GREENBERG,
Circuit Judges

The petition for panel rehearing filed by appellant Charles E. Pappas in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

Dated: May 29, 2001

No. 01-772

IN THE

Supreme Court of the United States

CHARLES E. PAPPAS, M.D.,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

DANIEL B. HUYETT
Counsel of Record
E. THOMAS HENEFER
TODD R. BARTOS
STEVENS & LEE
Attorneys for Respondent
111 North Sixth Street
Reading, PA 19603
(610) 478-2000

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QUESTIONS PRESENTED

1. Whether the Court should deny *Certiorari* on Petitioner's first claim of error where he lacks standing to bring the issue before this Court; and, even if he had standing to assert the claim of error before this Court, there is no conflict among the circuits that requires review by this Court?

2. Whether the Court should deny *Certiorari* on Petitioner's second claim of error which involves only the application of the harmless error doctrine to well-settled issues of state law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

. The Petitioner is Charles E. Pappas, M.D., the plaintiff before the District Court and appellant before the Circuit Court. Respondent is UNUM Life Insurance Company of America, the defendant before the District Court and appellee before the Circuit Court. UNUM Life Insurance Company of America is a wholly-owned subsidiary of UNUMProvident Corporation.

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I. COUNTERSTATEMENT OF THE CASE

A. Introduction

This case involves a dispute, arising under state law, between a physician (Dr. Pappas or "Pappas") and an insurer (UNUM Life Insurance Company of America or "UNUM") over disability insurance. As explained below, Pappas had a full opportunity to present his claims before the District Court and subsequently on appeal to the Third Circuit. Each time, however, Pappas' claims were found insufficient to require submission to a jury.

Pappas now asks this Court to review his state law claims under the pretext that his constitutional rights were somehow violated when the Court of Appeals issued an unpublished opinion. He further claims this Court should review the Court of Appeals' application of the harmless error doctrine to well-settled issues of state law.

Much like his state law claims at trial, all of which were dismissed on a Rule 50 motion at the close of plaintiff's evidence, Pappas' allegations of error to this Court are devoid of any legal merit and do not warrant discretionary review by this Court.

B. Proceedings before the District Court.

Pappas filed this action in the Court of Common Pleas of Philadelphia County, Pennsylvania, on May 30, 1997 alleging state law claims for alleged breach of contract, insurance "bad faith" under 42 Pa.C.S.A. §8371, and declaratory relief. UNUM removed the claim to the United States District Court for the Eastern District of Pennsylvania.

UNUM asserted a Counterclaim seeking a declaration that certain Cost of Living Adjustment (COLA) benefits were not due because of a policy exclusion, and claiming that Pappas was unjustly enriched by UNUM's mistaken payment of COLA benefits to which Pappas was not entitled.

As the Court of Appeals noted, there were disputes between Pappas and UNUM over his entitlement to benefits and their calculation. As a result of these disputes, UNUM twice offered to repurchase Pappas' disability policies as a means of settling the disputes between the parties. Pappas rejected both offers. Prior to trial, UNUM moved for *in limine* relief precluding the use, as evidence in the case, of the settlement negotiations. The District Court, citing Fed.R.Evid. 408, excluded the settlement negotiations as evidence of liability at trial.

After the close of Pappas' case, the District Court granted UNUM's motion under Fed.R.Civ.P. 50 for Judgment as a Matter of Law. The District Court granted the motion and dismissed Pappas' case because he failed to offer evidence upon which a jury could find, under the clear and convincing standard applicable to Pennsylvania bad faith claims, that UNUM had acted in bad faith. The District Court also dismissed the breach of contract and declaratory relief claims for lack of evidence.

After the close of UNUM's case in chief, the District Court held that (1) the exclusion riders rendered the COLA benefits inapplicable to Pappas' claim; (2) UNUM was entitled, under equitable principles of unjust enrichment, to restitution for past COLA payments in the amount of $110,701.55; and (3) UNUM was entitled to a declaratory

judgment relieving it from any obligation to provide future COLA benefits.

C. Proceedings before the Third Circuit.

Pappas appealed the judgment of the District Court to the United States Court of Appeals for the Third Circuit on December 18, 2000. Pappas alleged, among other things, that the District Court erred by excluding evidence of offers to repurchase the policies under Fed.R.Evid. 408 and by usurping the role of the jury in granting UNUM's Rule 50 motion.

The issues presented to the Third Circuit were extensively briefed by both parties, and then were argued before a panel of the Third Circuit. Thereafter, the Third Circuit issued a thorough memorandum opinion that examined -- and rejected -- Pappas' claims of error in great detail.

Of particular relevance here, the Third Circuit carefully considered Pappas' claim that the District Court's ruling under Rule 50 was flawed because UNUM's offer to repurchase the policies was evidence of bad faith. Specifically, the Third Circuit determined that the District Court erred in excluding the offers to repurchase under Fed.R.Evid. 408, as they were being offered not as evidence of liability but, rather, as evidence of UNUM's alleged bad faith.

However, the Third Circuit determined that the exclusion of the evidence was harmless error because, even if presented to the jury, there was still insufficient evidence upon which a reasonable jury could determine, by clear and convincing evidence, that UNUM acted in bad faith:

> While, as discussed above, settlement attempts by an insurer may be evidence of bad faith, Pappas' allegations, even when combined with all the other evidence in the case, would not allow a jury to conclude that he demonstrated bad faith by clear and convincing evidence. UNUM had a legitimate dispute with Pappas over the amounts due under his policies, one to which he contributed by his reluctance to comply with UNUM's investigation. Accordingly, it is not reasonable to infer that it acted in bad faith in attempting to settle the dispute. With nothing else to support his claim, and even taking into account UNUM's attempt to repurchase its policies, Pappas' evidence would not permit a jury to conclude that Pappas clearly and convincingly established that UNUM acted in bad faith.

See, *Petition for Writ of* Certiorari, pp. 13a – 14a.

In short, the Court of Appeals held that the Rule 50 motion was properly granted because, even with the additional evidence, Pappas failed to meet his burden as a matter of law. The Third Circuit then rejected the remaining allegations of error dealing with COLA benefits and whether UNUM's equitable claim for unjust enrichment was properly tried as a bench trial because, after careful review, they were found to be without merit.

D. The Present Petition.

Pappas seeks *Certiorari* before this Court on two issues. First, he alleges that the Third Circuit violated his "litigant's rights" under Article III of the United States Constitution because it chose not to publish its memorandum decision in this matter. Therefore, Pappas seeks to have this Court grant *Certiorari* to "provide guidance to the Court of Appeals as to the Constitutionality and Propriety of non-precedential opinions." *See, Petition for Writ of* Certiorari, p. 8. Pappas implies, incorrectly, that this Court should resolve this issue because of substantial controversy among the lower courts. But, as explained below, while local appellate rules vary as to the precedential effect of unpublished opinions, there is no split among the Circuit Courts on the question of whether it is constitutionally permissible to issue an unpublished and nonprecedential opinion.

Quite apart from the question of whether unpublished opinions are unlawful, Pappas has not alleged any tangible impact or "harm" from the publication of an unpublished opinion that would confer standing. For example, he has not identified any unpublished case he was prohibited from relying upon in the proceedings before the lower courts. Nor has he alleged that he has been unable to use the Third Circuit's unpublished opinion in any other lawsuit to support his position. And, of course, the unpublished opinion is binding on the parties; therefore, Pappas has not (and cannot) claim he has been deprived access to the federal courts.

Rather than address the lack of any injury in fact, Pappas resorts to *ad hominem* attacks on the Third Circuit panel, implying that the judges did not devote the requisite

time and analysis to his case because its decision was unpublished. Interestingly, of the issues raised below, Pappas only seeks review of those determinations that were exhaustively analyzed by the Third Circuit.

Pappas also seeks to have this Court grant *Certiorari* because he claims the Third Circuit erred in finding that the offers to repurchase the policies should have been admitted but then concluding that their exclusion was harmless error. Pappas claims the issue of bad faith should have gone to the jury under the Seventh Amendment of the United States Constitution. However, there is no Seventh Amendment right to a jury trial on meritless claims and there is nothing unconstitutional about dismissing meritless claims.

II. REASONS FOR DENYING THE WRIT OF *CERTIORARI*

This case presents no unsettled or controversial legal issues and the resolution of Pappas' claims will have no impact on the public at large. Instead, Pappas attempts to bootstrap a misguided Constitutional argument about the use of unpublished decisions to obtain review of state law claims that two courts have already found insufficient for submission to a jury in hopes of convincing this Court to accept review.

However, Pappas lacks standing to bring his challenge to the propriety of unpublished memorandum decisions. Additionally, there is no conflict among the Circuits that would warrant *Certiorari*.

Finally, Pappas' claims regarding the Rule 50 motion presents no issue warranting *Certiorari*. Instead, his claims involve only the application of the harmless error doctrine to well-settled principles of state law.

In sum, as described below, this case presents no reason, compelling or otherwise, for review by this Court. *Certiorari* should therefore be denied. Sup. Ct. R. 10.

A. Pappas lacks standing to assert a Constitutional challenge to the propriety of unpublished opinions.

Pappas claims the Third Circuit violated his Constitutional rights under Article III by issuing an unpublished decision. Pappas essentially asserts that all decisions of the Federal courts must be published and

afforded precedential status.[1] But Pappas lacks standing to challenge the propriety of unpublished opinions.

Article III's standing requirements are rooted in one of the hallmarks of our nation's system of governance: the constitutional separation of powers. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of the federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997), *citing, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The requirement of standing is an "irreducible constitutional minimum" for a party seeking to invoke federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991).

Pappas bears the burden of proving that he has standing. *Id., citing, FW/PBS, Inc. V. Dallas*, 493 U.S. 215, 231 (1990). His burden is not merely one of proper pleading. Because standing is "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

In order to meet this burden, the Pappas must satisfy each of the following three elements of standing: (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation of the injury

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[1] Taken to its logical conclusion, Pappas' position would prohibit any appellate court from rendering any decision (such as a summary affirmance or denial of a Petition for Writ of *Certiorari*) without a published opinion.

by the defendant's complained of conduct; and (3) a likelihood (rather than speculation) that the requested relief will redress the injury. *Lujan*, 504 U.S. at 560-61. Pappas, however, cannot satisfy any of these elements.

As to the first prong, there exists no legally protectable interest to a published opinion deciding the merits of any appeal. In fact, courts of appeal throughout the United States issue unpublished opinions every day that resolve the disputes as to the particular parties and issues in that case. The alleged right to a published opinion is merely hypothetical, and Pappas has not directed, and cannot direct, this Court to any authority holding otherwise. Moreover, Pappas has not been denied access to the Courts in any sense; instead, he was given a full opportunity to be heard and received a timely and binding resolution of his dispute, a fact not altered by the lack of a published opinion.

Second, Pappas has not, and cannot, offer any evidence of an actual injury caused by either the Third Circuit's issuance of an unpublished decision or by the general practice of courts issuing unpublished decisions. He has not identified any unpublished opinion he was prohibited from citing before the District Court or the Circuit Court. Nor has he alleged that he has been prohibited from using the Third Circuit's decision in this case as authority in some other litigation.

As a substitute for an actual injury, Pappas offers the remarkable assertion that because the Third Circuit's decision was unpublished, he is allegedly left "in the untenable position of not knowing whether the Court of Appeals in fact gave his case the time and effort it required, and whether the Court truly considered the validity of the District Court's opinion." *Petition for Writ of* Certiorari,

p. 11. Thus, he claims he has "diminished confidence" in whether he has been given his "day in court." *Petition for Writ of* Certiorari, p. 18. Pappas' *ad hominem* attacks on the Third Circuit panel are unfounded.

Preliminarily, there is absolutely no evidence that the Third Circuit did not carefully review this matter. To the contrary, the arguments were fully briefed and oral argument was held. Then the Court issued a thorough opinion that carefully reviewed the applicable law and facts. Notably, the Third Circuit did not "rubber stamp" the District Court's opinion; instead, it reversed the District Court's ruling under Fed. R. Evid. 408 but concluded the error was harmless.

Moreover, such speculation about whether the judges of the Third Circuit consider cases carefully is no substitute for Article III's irreducible constitutional requirement that the threatened harm be an actual or imminent injury. *Lujan*, 504 U.S. at 564. Thus, Pappas improperly asks the Court to grant *Certiorari* where there is no evidence of any injury. *Id.*

Finally, Pappas must demonstrate that a decision by this Court would adequately redress his grievance regarding the unpublished opinion. Here, an order from this Court requiring the Third Circuit to publish its opinion would not alter Pappas' substantive position at all; therefore, the third prong for standing is not satisfied.

At least one court has already rejected a challenge to the use of unpublished decisions on standing grounds. In *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048, 1052 (N.D.Cal. 2001), the Northern District of California held that the plaintiff lacked

standing to assert a claim against the Ninth Circuit for declaratory relief declaring that the Circuit's rule, prohibiting citation to unpublished dispositions, was unconstitutional. The court held:

> As previously noted, however, Schmier does not assert that he has attempted to cite an unpublished disposition in this action in violation of Rule 36-3. Nor does Schmier suggest that he attempted to no avail to have an unpublished disposition published under Rule 36-4. Indeed, Schmier's opposition to defendants' motion to dismiss did not even contain citations to any unpublished opinions.
>
> As a recent case in the Eighth Circuit upon which Schmier places great weight makes clear, in order for a litigant to have standing to challenge these type of circuit rules, the party must cite an unpublished decision in an actual case.

Id. (citing *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*Anastasoff I*) and *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (*Anastasoff II*)).

B. There is no conflict among the Circuits that would compel this Court to accept review.

Pappas suggests that the Court should grant *Certiorari* because the use of unpublished decisions is "the subject of much debate" among the legal community.

Petition for Writ of Certiorari, p. 9 But there is no split among the circuits and any "debate" is, at this point, merely academic.

The shortcomings of Pappas' position is perhaps best revealed by his reliance on the Eighth Circuit's opinion in *Anastasoff I* (*Petition for Writ of* Certiorari, pp. 15-16), in which Circuit Judge Arnold held, as a matter of law, that rules precluding citation to unpublished opinions violated Article III of the Constitution. 223 F.3d at 905. But Pappas glosses over the subsequent appellate history in which Anastasoff petitioned for a rehearing *en banc*, which was granted by the Eighth Circuit. Before the court heard the matter *en banc*, the parties reached a settlement. *Anastasoff II*, 235 F.3d at 1055. The Circuit, *en banc*, through Circuit Judge Arnold, issued the *Anastasoff II* decision on December 18, 2000, approximately four months after the panel opinion was published. In *Anastasoff II*, the Circuit, *en banc*, vacated the panel decision as moot, but also took an extra step and concluded:

> Here, the case having become moot, the appropriate and customary treatment is to vacate our previous opinion and judgment, remand to the District Court, and direct that Court to vacate its judgment as moot. We now take exactly that action. **The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.**

Id. at 1056 (emphasis added). Therefore, the Eighth Circuit vacated the panel opinion and expressly noted that, as a result, the Eighth Circuit has not ruled on the

constitutionality of the precedential value of unpublished decisions.[2]

Pappas glosses over the Eighth Circuit's vacation of its own opinion and moves on to analyze the Ninth Circuit's opinion in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), leaving the impression that the *Hart* decision evidences a split of authority among the Circuits when put next to *Anastasoff I*. In fact, given *Anastasoff II*, there is no split between the Eighth and Ninth Circuits on this issue.

Hart, is, in fact, instructive here, because the Court addressed and rejected many of the alleged concerns Pappas raises. The *Hart* court cogently stated:

> That a case is decided without a precedential opinion does not mean it is not fully

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[2] Many Federal courts have recognized the Eighth Circuit's abrogation of its holding in *Anastasoff I*, including the Eighth Circuit itself. *See, e.g., Andrews v. Neer*, 253 F.3d 1052, 1057 n. 3 (8th Cir. 2001)(reasserting vacation of *Anastasoff I* and stating that Rule 28A(i) remains in full force and effect); *Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 816 n.3 (8th Cir. 2001)(same); *United States v. McClean*, No. 00-2973 2001 U.S.App. LEXIS 21629, *4 n.2 (8th Cir. Oct. 10, 2001)(same); *United States v. Lopez-Pastrana*, 244 F.3d 1025, 1036 n.5 (9th Cir. 2001)(Graber, C.J., dissent); *Holland v. Horn*, 150 F.Supp.2d 706, 720 n.8 (E.D.Pa. 2001)(recognizing Eighth Circuit's abrogation of *Anastasoff I* as well as absence of any Third Circuit precedent on issue of unpublished decisions); *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048, 1052 (N.D.Cal. 2001); *Lewis v. Rosenfeld*, 145 F.Supp.2d 341, 345 n.8 (S.D.NY 2001); *Newell v. Rolling Hills Apartments*, 134 F.Supp.2d 1026, 1040-1041 (N.D.Iowa 2001).

> considered, or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases. As the Federal Judicial Center recognized, "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, Standards for Publication of Judicial Opinions 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.

Id. at 1177-1178.

In short, despite Pappas' claim that there is a "debate" over this issue, there is no split among the Circuits because the Eighth Circuit vacated its own opinion in *Anastasoff I*, thereby leaving open the question of constitutionality of rules regarding precedential status of unpublished dispositions. Accordingly, there is no split in the Circuits, and review should be denied. Sup. Ct. R. 10(a).

C. The Third Circuit Did Not Ignore Pennsylvania law on unjust enrichment.

Pappas asserts in footnote 4 of his Petition that the alleged concerns about unpublished decisions are "particularly apt" here because, he claims, the Third Circuit ruled in contravention of Pennsylvania law on the issue of unjust enrichment. Contrary to Pappas' position, it is well settled that "[u]nder Pennsylvania law, an insurer may recover payments to the Insured under a mistake of fact or as a result of fraud or misrepresentation." *Van Riper v. The Equitable Life Assur. Soc.*, 561 F. Supp. 26, 33 (E.D. Pa. 1982), *aff'd*, 707 F. 2d 1397 (3d Cir. 1983) (emphasis added); *cf. Foster v. Federal Reserve Bank of Philadelphia*, 113 F. 2d 326, 327-28 (3d Cir. 1940). The presence of a contract between the parties does not defeat an unjust enrichment claim because there is no contractual provision in the policies requiring Pappas to repay the mistakenly paid COLA benefits; thus, UNUM had no adequate contract remedy available at law. Therefore, the Third Circuit ruled in accordance with Pennsylvania law.

D. The Third Circuit's harmless error ruling is not appropriately the subject of review by this Court.

Pappas' second allegation of error seeks to have this Court eviscerate Fed.R.Civ.P. 50 and to require that all claims, whether meritorious or meritless, be sent to the jury. Pappas ignores the fact that there is no Seventh Amendment right to a jury trial on a meritless claim. The District Court has discretion to determine, as a matter of law, that a plaintiff has failed to meet his burden of proof and therefore terminate plaintiff's case at the close of his evidence.

In fact, there are several methods under the Federal Rules of Civil Procedure by which the District Court may take a case away from the jury.[3] It follows that, under Fed.R.Civ.P. 50(a), the District Court may dismiss an action after plaintiff's case-in-chief if it determines, as a matter of law, that the plaintiff has failed to adduce sufficient evidence upon which a reasonable jury could return a verdict in its favor.

Significantly, the facts concerning the settlement negotiations were not in dispute and were presented to the District Court in briefs filed by both parties on UNUM's motion *in limine*. The Court of Appeals ruled, as a matter

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[3] For example, Fed.R.Civ.P. 12(b)(6) provides that the District Court may dismiss an action for failure to state a claim upon which relief may be granted if it determines, as a matter of law, that the allegations in the complaint do not support the *prima facie* elements of the cause of action pleaded. Rule 56(c), Fed.R.Civ.P., permits the District Court to dismiss part or all of plaintiff's case before trial if it determines, viewing the evidence in the light most favorable to the plaintiff, that plaintiff can not prevail on its claim as a matter of law.

of law, that even if those facts were presented at trial (rather than in a motion *in limine*), Pappas' bad faith claim did not require submission to a jury.

In short, all of these issues are matters of law, not fact. *See,* Fed.R.Civ.P. 50(a). As they are issues of law, they are properly decided by a judge and not the jury. On appeal, the Third Circuit exercises plenary review of conclusions of law. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 215 F.3d 407, 409 (3d Cir. 2000)(setting forth scope of plenary review). Therefore, the Third Circuit had discretion to review the evidence in the same manner as did the District Court and determine whether, as a matter of law, Pappas had presented sufficient evidence upon which a reasonable jury could return a verdict in his favor. Because the Third Circuit applied a rule of law in finding harmless error, this Court should decline review. *See,* Sup. Ct. R. 10 ("A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As the Third Circuit determined that it was error to exclude evidence of offers to repurchase the policy, the issue then turned to whether such error was harmless. The Third Circuit reviewed the issue in the context of the Rule 50(a) motion. Therefore, this determination of harmless error was a legal question, not a factual one, and the Third Circuit was correct to find that the exclusion of the evidence was harmless. *See, West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995)(discussing harmless error).

There is nothing controversial or unusual about the harmless error doctrine. In fact it is set forth in Fed.R.Civ.P. 61 which provides in relevant part: "The court

at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Pappas asserts that the jury was the proper body to determine whether UNUM's conduct rose to the level of bad faith. Pappas even cites to *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959), for the well-known maxim that the right to a jury trial is Constitutional. Pappas is correct that the right to a jury trial is protected by the Seventh Amendment. However, Fed.R.Civ.P. 50(a) grants the District Court discretion to determine if the evidence presented warrants deliberation by the jury.

In other words, the District Court performed a review of the evidence to determine if Pappas had met his burden of proof *as a matter of law*. The District Court found that he had not. The Third Circuit reviewed the exclusion of evidence and found that the exclusion of certain evidence was error. However, because the Third Circuit exercised plenary review, it then performed the same analysis as did the District Court under Fed.R.Civ.P. 50(a), and found that the exclusion of evidence was harmless error because, even if admitted at trial, it would not have had the effect of meeting the burden of proof by clear and convincing evidence. Accordingly, even had the erroneously excluded evidence been admitted at trial, Pappas' claims still would have failed as a matter of law.

III. CONCLUSION

This Court should deny Pappas' Petition for Writ of *Certiorari* because there are no compelling reasons presented in the Petition that trigger this Court's discretionary review. He has attempted to dress-up his claims in Constitutional clothing to no avail. Pappas lacks standing to assert any claim for violation of his Article III rights by the Third Circuit's decision to issue an unpublished disposition. Even if he has standing to assert a violation of his Article III rights, there is no split of authority among the Circuits warranting review. Instead, Pappas seeks to have this Court redraft the Third Circuit's Internal Operating Procedures in a vain attempt to argue the same position another time. Finally, Pappas' argument regarding harmless error is specious because it is clear that the District Court may, upon motion, dismiss a case at any of several procedural steps if the District Court concludes, as a matter of law, that plaintiff has failed to meet his burden of proof.

Accordingly, the Petition for Writ of *Certiorari* should be denied.

DANIEL B. HUYETT
Counsel of Record
E. THOMAS HENEFER
TODD R. BARTOS
STEVENS & LEE
111 NORTH SIXTH STREET
READING, PA 19603
Counsel for Respondent
UNUM Life Insurance
Company of America